(1)

FILED

NO. 961385 NOV 19 1996

OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT
Term October 1996

HOUSE THE HOMELESS, INC., a non-profit organization; RICHARD R. TROXELL, President; and CHRIS LYNE, an individual,

PETITIONERS

V.

SHELLY E. WIDNALL, in her official capacity as Secretary of the United States Air Force; WILLIAM J. PERRY, in his official capacity as Secretary of Department of Defense; and JESUS GARZA, in his official capacity as City Manager of the City of Austin,

RESPONDENTS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CECILIA M. WOOD
P. O. Box 684692
Austin, Texas 78768
Telephone No. 512-708-8783
Facsimile No. 512-708-8782
State Bar No. 21885100
ATTORNEY FOR PETITIONERS

80 pp

QUESTIONS

I. DO THE RULINGS OF FIFTH CIRCUIT IN THIS CASE CONTRADICT PREVIOUS RULINGS OF ANOTHER FEDERAL COURT?

II. CAN A FEDERAL COURT IN ONE JURISDICTION DENY RELIEF TO A PARTY THAT IS ENTITLED TO SAID RELIEF BY VIRTUE OF AN INJUNCTION PREVIOUSLY ISSUED BY ANOTHER FEDERAL COURT?

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	iii
CITATION OF REPORT.....	iv
STATEMENT OF JURISDICTION	1
STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE	1
ARGUMENT	11
I. DO THE RULINGS OF FIFTH CIRCUIT IN THIS CASE CONTRADICT PREVIOUS RULINGS OF ANOTHER FEDERAL COURT?	11
II. CAN A FEDERAL COURT IN ONE JURISDICTION DENY RELIEF TO A PARTY THAT IS ENTITLED TO SAID RELIEF BY VIRTUE OF AN INJUNCTION PREVIOUSLY ISSUED BY ANOTHER FEDERAL COURT?	20
CONCLUSION	24

TABLE OF CITATIONS

FEDERAL CASES	PAGE
G. & C. Mirram v. Webster, 639 F. 2d 29 (1st Cir. 1980)	22
Hartman v. Witty, 480 F. 2d 337 (3rd Cir. 1973).....	21
Lee v. Pierce, 698 F. Supp. 332, (D. C. 1988).....	16,17 18
National Center on Homelessness and Poverty v. United States Veteran's Administration, 964 F. 2d 1210 (D. C. Cir. 1992)	13,16
National Coalition for the Homeless v. United States Veteran's Admin., 695 F. Supp. 1126 (D. C. 1988).....	13, 14,18 19,20
National Coalition for the Homeless v. United States Veteran's Administration, 715 Fed. Supp. 392 (D.D.C. 1989).....	15,18
National Law Center on Homelessness v. United States Veteran's Administration, 765 F. Supp 1 (D. D. C. 1991)	15
National Law Center on Homelessness v. U. S. VA, 819 F. Supp 69 (D. D. C.1993).....	21
Stiller v. Hardman, 324 F. 2d 626 (1967).....	22

RULES AND REGULATIONS

Comprehensive Environmental Response, Compensation and Liabiltiy Act of 1980, Pub.L. No. 103-421, Section 2(e), 108 State. 4352 (1994) (10 U. S. C. 2687 note)..... 5

FED. R. CIV. PROC., R 65 22,23

28 U.S.C. Section 1251 vi

42 U.S.C. Section 11411 ..... 3,7, 12,23

42 U.S.C. 11411(a) 11,21

FEDERAL REGISTER

58 Fed. Reg. 9208, 9215 (1993)..... 5, 11

58 Fed. Reg. 15158 (1993)..... 5, 11

58 Fed. Reg. 45353 (1993)..... 5, 11

CITATIONS OF REPORTS

House the Homeless, Inc., et. al. v. Sheila E. Widnall, et. al, 94 F3d 176, (5th Cir.1996) ..... Appendix A

National Law Center on Homelessness and Poverty, et. al. v. United States Veterans Administration, et. al ..... Appendix B

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered on August 21, 1996. This court has jurisdiction based on the appropriate jurisdiction of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U. S. C. Section 1251. Notice has been served on the Solicitor General and the Attorney of Record for the federal agencies in accordance with Rule 29.4(b).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS

42 U.S.C. Section 11411
(entire text located in Appendix C)

STATEMENT OF THE CASE

In 1942, the United States Air Force which was at that time part of the United States Army, entered into an agreement to purchase a parcel of land to be used as Bergstrom Air Force Base during World War II.

Purchase money for the land was provided by the City of Austin. The terms of the agreement were contained in a night letter dated April 11, 1942 which stated in pertinent part:

"TITLE TO VEST IN THE UNITED STATES AND TO BE CONVEYED TO THE CITY OF AUSTIN WHEN NO LONGER NEEDED BY GOVERNMENT AFTER PRESENT WAR....." and

" ANY STRUCTURES ERECTED BY GOVERNMENT WILL REMAIN PROPERTY OF UNITED STATES PERIOD RUNWAYS COMMA ROADS COMMA ETC WHICH ARE NOT SALVAGEABLE WILL REMAIN IN PLACE PERIOD LANDS WILL BE TURNED OVER TO THE CITY IN PRESENT CONDITION EXCEPT AS TO EXISTING BUILDINGS WHICH ARE TO BE DEMOLISHED PERIOD GOVERNMENT TO HAVE OPTION OF LEAVING ON LANDS PART OR ALL STRUCTURES TO BE ERECTED IN LIEU OF RESTORATION PERIOD"

That same day the City of Austin responded by telegram accepting those terms "in full without any restrictions by the Austin City Council." When World War II ended, contrary to the express terms of the 1942 agreement, the air base remained open. In 1947, the Austin City Council passed a unilateral resolution stating that the base could remain open at the will of the federal government and that title did not need to be returned to

the city for so long as the property was used as an air base. Thereafter, sporadic communications continued between the city and federal government regarding title to the property as well as to the improvements. At no time did the federal government relinquish claim to the improvements.

In 1987, responding to the national crisis of homelessness, Congress passed the Stewart B. McKinney Act. Title V of said act required that all unused or underutilized, surplus and excess property be reported to the Department of Housing and Urban Development, hereinafter referred to as "HUD" to be evaluated, posted, and ultimately made available to homeless advocates and providers for use in serving the needs of the homeless population. 42 U.S.C 11411. When it became evident in 1991 that Bergstrom Air Force Base would likely be included in the base closures required by the downsizing of the United States military defenses, Plaintiff, Richard R. Troxell, President of House the Homeless,

Inc., notified the City of Austin and several federal agencies including HUD, the Department of the Air Force, and the Department of Defense of his intent to obtain use of a portion of the assets comprising the air base to serve the needs of the homeless population in Austin, pursuant to the McKinney Act.

On February 3, 1993, the Austin City Council passed a resolution to implement Appellants' detoxification/treatment/rehabilitation/job training/job placement program at the Bergstrom Air Force Base where the city planned to build and operate a new municipal airport simultaneously. Also, in February, as well as March and August of that year, some portions of the air base were reported in the federal register in pertinent part as follows:

> "Land 40.50 acres, Bergstrom Air Force Base... Property Number 199310001" and Land 46.27 acres, Bergstrom Air Force Base... Property Number 199310002."

(February 19, 1993);

"11 Ammo Storage Buildings, Bergstrom Air Force Base....Property Number 199310004." (March 19, 1993)"; and "Land 40.50 acres, Bergstrom Air Force Base... Property Number 199310001" and Land 46.27 acres, Bergstrom Air Force Base... Property Number 199310002." (August 27, 1993);

See 58 Fed. Reg. 9208,9215 (1993); 58 Fed. Reg. 15158 (1993); 58 Fed. Reg. 45353 (1993). The February and August postings represent the same pieces of property as evidenced by their property numbers and as was necessary due to the quarterly reporting requirements of the McKinney Act. Other than the 11 buildings and the 86.77 acres of land, no other property was reported.

In September of 1993, Bergstrom Air Force Base, with the exception of a small area still being used by the United Air Force Reserves, closed. Due to the preemption by

CERCLA[1], another federal law passed in the interim between the original purchase of the 1942 agreement and the 1993 closing of the air base, the federal government was prohibited from conveying legal title to any of the property. The Appellees entered into a lease agreement which granted the City of Austin possession of all of the assets not being used by the reserves, for a period of thirty years. At the present time, legal title to all of the assets comprising Bergstrom Air Force Base remains in the federal government.

Early in 1995, the City of Austin redesigned the plans for the new municipal airport requiring the demolition of buildings allocated for Appellants' program. Later

---

1. CERCLA is the federal law which requires the U. S. Government to remediate hazardous substances on federal real property before that property can be conveyed to third parties.

that same year, the City of Austin issued a Request for Proposal for an Interim Housing Program. Although the program was supported by and advocated for by Appellants, it was not even similar to the program that Appellants sought to implement. Additionally, the Request for Proposal was not funded by the city. Further, because the program was an independent act by the City rather than in compliance with the McKinney Act, no homeless provider could apply for the funds provided by Title IV of the McKinney Act. 42 U. S. C. 11411.

In December of 1995, Appellants filed suit pursuant to the McKinney Act requesting compliance with the federal statute, the case law and existing injunction previously issued by the federal district court in Washington, D. C. as well as requesting additional injunctive relief to protect assets which the City of Austin had begun to destroy. See,Appendix B.

The facts which are undisputed by all

parties are as follows: First, the United States Government holds legal title to all land and the improvements thereon. R., vol. 1 - trial exhibits, plaintiff's exhibit 1.; R., vol. 6, p. 647. Second, the United States Government used approximately four hundred sixty-six thousand dollars ($466,000.00) of the six hundred thousand ($600,000.00) tendered by the City of Austin for purchase money to obtain the original two thousand eight hundred and ninety (2890) acres and the remainder was returned to the City of Austin. Third, an additional amount of land was subsequently purchased with solely federal dollars. Fourth, all of the improvements located on the base were purchased with federal dollars.

What is disputed are the facts concerning the Appellee's claimed reversionary interest in the originally acquired land purchased with dollars provided by the City of Austin which constitutes approximately three-fourths of the total

amount of land in question and the characterization of the assets located thereon. Appellants contend that both federal and state law as well as the agreement entered into in 1942 between the Appellees require that all of the improvements be considered as separate assets and that as such they are required to be posted and evaluated in accordance with the McKinney Act. Additionally, Appellants contend that any reversionary interest in the originally acquired land was waived by the City of Austin in 1947 or, in the alternative, that the thirty-year lease on the land is a separate property interest in the case at bar, given the circumstances, and consequently, subject to the McKinney Act. However, these issues were never tried because the case was dismissed before discovery or trial. Nevertheless, even if Appellees were to prevail on those points at trial, it would not affect title to the remaining one-quarter land and all of the

improvements located thereon.

The remaining one-quarter of the land was subsequently purchased with solely federal dollars and solely in the name of the federal government and the City of Austin makes no claim to this land or any improvements located thereon. Even Appellees agree that at a minimum, at least 324 acres were subject to the McKinney Act[2]. The federal government claimed, for the first time on appeal, that it had complied fully with the McKinney Act with the exception of the failure to post 3.5 acres of land. Nevertheless, a quick review of the applicable portions of the federal register indicates only a small portion of the

---

2. R., vol. 1 - trial exhibits, defendant's exhibit 5, p. 3; R. vol. 9, p. 52, l. 12-20; p. 81, l. 9 - 16. This is the figure stipulated to by the federal government in their brief to the Fifth Circuit Court of Appeals, page 31. The record does not support these low figures.

property subject to the McKinney Act, 11 buildings and the 86.77 acres of land, were ever reported. 58 Fed. Reg. 9208, 9215

Whether the amount is 3.5 acres, 235.23 acres, or more; Appellees violated the law and the injunction already in effect. Consequently, dismissal of this case was in error and in contradiction to other federal holdings.

ARGUMENT

The McKinney Act represents legislation of serious magnitude. The Fifth Circuit decided this important matter in a way that conflicts with relevant decisions of another federal court. Additionally, it ignored and contradicted the terms of the previous federal injunction in effect since 1988.

I. DO THE RULINGS OF FIFTH CIRCUIT IN THIS CASE CONTRADICT PREVIOUS RULINGS OF ANOTHER FEDERAL COURT?

Paramount is the overriding fact that Appellees themselves were not authorized to determine which property was subject to the McKinney Act. Both the McKinney Act and the

1993 injunction issued to enforce the same, require all landholding agencies to report within 25 days after a request for information from "HUD", any and all excess, surplus, unutilized, or underutilized properties owned or controlled by the agency. R., vol. 1, p. 18; 42 U.S.C. 11411(a). Although statutory law exempts certain properties from being made available for use by homeless providers pursuant to the McKinney Act, neither the injunction nor the McKinney Act itself makes reference to any exceptions that would relieve a landholding agency from the duty to report all of the excess, surplus, unutilized, or underutilized properties in their possession to "HUD". Case law also clearly states that all unused/underutilized/excess/ surplus property is to be reported to the "HUD" and that only "HUD" is authorized to make determinations of suitability.

> "Neither the statute nor the legislative history explain why Congress

> chose to have the Department of Housing and Urban Development, not the agency heads, make the suitability determinations ..... In any event, the Department of Housing and Urban Development is not free to ignore the statute's unequivocal command that HUD shall identify suitable properties" (emphasis added).

National Coalition for the Homeless v. United States Veteran's Admin., 695 F. Supp. 1226 (D. D. C. 1988); aff'd 964 F. 2d 1210 (D. C. Cir. 1992).

In the case at bar, Appellees chose to ignore this body of law and failed to report most of the property in question. They argued that some of the property was subject to the McKinney Act and gave no reason for their failure to report the remainder. However, none of the Appellees ever suggested that the property was unused/ underutilized/ surplus/excess property. In failing to report any of the property to HUD, the

federal landholding agencies acted arbitrarily and capriciously, violating the law and the existing injunction. The trial court failed to meet its obligation to compel the landholding agency to comply with its statutory duty. National Coalition for the Homeless v. United States Veteran's Administration, Id. In not so finding, the Fifth Circuit has created a conflict in the law.

Further, Appellants, like other similarly situated litigants, met the requirements to be granted the additional injunctive relief requested. Not only did Appellants prove that they were likely to succeed on the merits of the case, at least minimally as to the after-acquired property, but they also proved the additional elements necessary to obtain the additional injunctive relief requested in similar fashion to other successful litigants in other cases. Yet, the Fifth Circuit affirmed the holding of the lower court, also denying also relief.

The McKinney Act was enacted to,

> "provide a program for addressing what Congress found to be the greatest obstacle facing organizations providing help to the homeless."

National Law Center on Homelessness v. United States Veteran's Administration, 765 F. Supp. 1 (D. D. C. 1991).

> "In passing the McKinney Act, Congress found that the Federal Government has a clear responsibility and an existing capacity to help meet an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families."

National Law Center on Homelessness v. United States Veteran's Administration, Id.. "It was intended to use public resources and programs in a more coordinated manner to meet the critically urgent need of the homeless." National Coalition on Homelessness v. United States Veteran's Administration, 715 F. Supp. 392 (D. D. C. 1989).

Appellants are the parties which Congress intended to protect. Appellees' compliance with the statute was the "necessary first step" for Appellants to benefit from the statute. Lee v. Pierce, 698 F. Supp. 332 (1988). Since the property was never appropriately reported, Appellants could not apply for the use of the federal property or federal funding for their program which is available under the same act. National Law Center on Homelessness and Poverty v. United States Department of Veteran's Affairs, 964 F. 2d 1210 (D. C. Cir. 1992). Accordingly, Appellants presented adequate evidence of their actual harm. R., vol. 1, p. 24,; R., trial exhibits - , Plaintiffs, exhibit 5.

Although nearly six thousand (6,000) homeless men, women, and children have been identified as living in the immediate vicinity of the Bergstrom Air Force Base, there are only four hundred and seventeen (417) emergency shelter beds and one hundred

(100) transitional housing units in the city of Austin to address this overwhelming need. At the time of the base closure, there were approximately seven hundred and nineteen (719) housing units in addition to other facilities, including, buildings, fixtures, and equipment. Similar to the circumstances in Lee v. Pierce, Appellants' inability to find sufficient housing is caused, at least in part, by Appellees refusal to comply withthe McKinney Act. Lee v. Pierce, supra.

Further, the assets in the case at bar are unique because they consist of housing already located in a small city type setting with streets, utilities, lighting, etc. already in place. It is highly unlikely that comparable facilities could be located and substituted to compensate Appellants. Regardless, the Court in National Coalition for the Homeless v. United States Veteran's Administration held that,

> "because locating property in suitable locations appears to be a primary

impediment to assisting homeless, any suitably located properties in defendant's inventories are especially valuable." (emphasis added). National Coalition for the Homeless v. United States Veteran's Administration, 695 F. Supp. 1226, supra. Additionally, although the Lee Court held that those Appellants were not irreparably harmed, it was because the pool of assets in that case, unlike the case at bar, were continuously being replenished. Lee v. Pierce, supra. These assets cannot be replaced and the McKinney Act makes no specific provision for monetary damages.

More critical is the irreparable loss of human life. R., vol. 1, p. 24. Rather than reaping the benefits intended by Congress, Appellants continue to experience increasing hardship, pain, illness, and even death as a result of Appellees omissions.

Similarly, Appellants in National Coalition for the Homeless v. The United States Veteran's Administration argued that,

"Appellees's actions deny them access to facilities they sorely need." National Coalition for the Homeless v. The United States Veteran's Administration, 695 F. Supp. 1226, supra. They went on to assert, "these consequences are immediately exacerbated by the onset of winter." National Coalition for the Homeless v. United States Veteran's Admin., Id. The District Court for the District of Columbia accepted the Appellants' argument holding that, "monetary injury is, by definition, less weighty than the personal injuries that they are suffering," and granted the injunctive relief. National Coalition for the Homeless v. United States Veteran's Admin., Id. They further held, "The Court finds on the balance, the public interest and minimal harm to the Appellees supports the issuance of an injunction." National Coalition for the Homeless v. United States Veteran's Admin., Id. The Court went on to say "that an injunction would further the public interest and result in de minimis

injury to Appellees." National Coalition for the Homeless v. United States Veteran's Admin., Id.

The Appellees in that case had argued that injunctive relief would damage them in the amount of over $100 million annually. National Coalition for the Homeless v. United States Veteran's Admin., Id. Appellees, in the case at bar, alleged damages of only seventy-three million dollars($73,000,000.00). R., vol. 9, p. 92, trial exhibits - defendants 18.

Accordingly, the denial of the injunctive relief in this cause creates a conflict with other rulings on this same issue.

II. CAN A FEDERAL COURT IN ONE JURISDICTION DENY RELIEF TO A PARTY THAT IS ENTITLED TO SAID RELIEF BY VIRTUE OF AN INJUNCTION PREVIOUSLY ISSUED BY ANOTHER FEDERAL COURT?

Pursuant to the McKinney Act the federal appellees were required to report a disputed amount of the assets comprising Bergstrom Air Force Base to "HUD" for a suitability

determination regarding use by the homeless population in Austin, Texas. 42 U.S.C. 11411 (a). More importantly, the federal Appellees were made aware of their obligations not only by Appellants, but also because of they had been under a very specific injunction from the District Court in the District of Columbia. See, Appendix B. This injuntion which has been in effect since 1988 and most recently modified in 1993, is important because it has in general caused an improvement in the performance behavior of landholding agencies. See, Appendix B; National Law Center on Homelessness v. U. S. VA, 819 F. Supp. 69 (D. D. C. 1993). Neither the parties in the case at bar or the courts have challenged thevalidity of the injunction in question.

If not absolutely void, an injunction must be obeyed in spirit as well as literally. Hartman v. Witty, 480 F. 2d 337, (3rd Cir. 1973). Further, the mandate of an injunction issued by a federal court runs

throughout the United States. Stiller v. Hardman, 324 F. 2d 626 (1967). Therefore, the federal Appellees were compelled not only by statutory law, but also by court order, to comply fully with the requirements of the McKinney Act before transferring any property subject thereto to the City of Austin. Had they done so, Appellants would have no complaint.

Additionally, the City of Austin, although not subject to the statutory law, was subject to the requirements of the McKinney Act pursuant to the injunction. An injunction cannot be circumvented by the creation of another entity. G & C Mirram v. Webster, 639 F. 2d 29 (1st Cir. 1980); Fed R. Civ. Proc. 65 (d). Common law doctrine provides that in order to bind a non-party by an injunction, the non-party must be legally identified with or subject to the control of the bound party. G & C Mirram, Id. Statutory law provides that "those persons in active concert or participation with those

who received actual notice" of an injunction are also bound. Fed. R. Civ. Proc. 65. Such is the case at bar.

Regardless of the alleged reversionary interest, the City of Austin was only able to gain possession of the property through the lease and can act only pursuant to the authority given to it by virtue of the lease. Additionally, not only did the City of Austin receive actual notice, but the city was acting and continues to act only in concert with or by participating with the United States Air Force, the party which did receive actual notice. Even the trial court held that, "the claims against Defendants arise out of the same series of transactions or occurrences and involve common questions of fact." R., vol. 8, p. 924. See, Appendix A. Consequently, the City of Austin is subject to the injunction and therefore, required to assure compliance with the McKinney Act regarding all property subject to the same. 42 U. S. C. 11411. Accordingly, Appellees

had only one appropriate response, to comply with the McKinney Act. The failure of the Fifth Circuit Court to require the same creates conflict.

CONCLUSION

Regardless of the dispute regarding the originally purchased land, as a matter of law, at least some of the property in question is subject to the McKinney Act. Without waiving all other claims and the right to pursue the same at trial, Appellants urge this Honorable Court to find their cause should not have been dismissed, if only minimally for the portion of after-acquired land and the improvements located thereon. Finding that, Appellants respectfully pray that this Honorable Court grant their petition for writ of certorari because the rulings of the Fifth Circuit conflict with existing relevant case law and the conflict should be resolved by this Court.

APPENDIX A

HOUSE THE HOMELESS, INC., A Non-Profit Organization; Richard R. Troxell, President; Chris Lyne, Plaintiffs-Appellants,

v.

Sheila E. WIDNALL, Sec. Air Force, in her official capacity as Secretary of the United States Air Force, et al., Defendants.

Jesus GARZA, In His Official Capacity as City Manager of the city of Austin,
Defendant-Appellee.

HOUSE THE HOMELESS, INC., A Non-Profit Organization; Richard R. Troxell, President; Chris Lyne, Plaintiffs-Appellants,

v.

Sheila E. WIDNALL, Sec. Air Force, in her official capacity as Secretary of the United States Air Force, William J. Perry, Honorable, In His Official Capacity as Secretary of the Department of Defense; Jesus GARZA, In His Official Capacity as City Manager of the city of Austin, Defendants-Appellees.

No. 96-50065 & 96-50265

United States Court of Appeals,
Fifth Circuit.

August 21, 1996

Homeless advocacy organization, its president, and homeless person filed suit under Stewart B. McKinney Homeless Assistance Act, seeking injunctive relief to prevent the removal and/or destruction of housing stock

on land which was site of former Air Force base and which, upon base's closing, reverted to city. The United States District Court for the Western District of Texas, James R. Nowlin, J., denied organizations; and homeless persons; request for preliminary injunction, and they appealed. The court of Appeals, Benavides, circuit Judge, held that : (1) organization and homeless person were not entitled to preliminary injunction because they did not demonstrate substantial likelihood of success on the merits, and (2) land and improvements at former Air Force base fell under reversionary interest exception of the McKinney Act.

Affirmed.

1. Federal Courts 30

When merits of case are clearly against the party seeking to invoke federal court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make case a poor vehicle for deciding jurisdictional

question, federal court may rule on the merits without reaching the jurisdictional contention.

2. Injunction 138.1

Preliminary injunction may be granted only if movant can establish four requirements: movant must establish substantial likelihood of success on the merits; there must be substantial threat of irreparable injury if injunction is not granted; threatened injury to movant must outweigh the threatened injury to nonmovant; and granting of preliminary injunction must not disserve the public interest.

3. Federal Courts 815

Injunction 135

Decision to grant or deny preliminary injunction lies within discretion of federal district court will be reversed on appeal only upon a showing of abuse of discretion.

4. Injunction 138.66

Homeless advocacy organization, its

president, and homeless person were not entitled to preliminary injunction under Stewart B. McKinney Homeless Assistance Act enjoining the removal and/or destruction of housing stock on land which was site of former Air Force base and which, upon base's closing, reverted to city; homeless advocacy group failed to demonstrate substantial likelihood of success on the merits since neither Air Force nor city was subject to regulations of the Act which exempts "property interest subject to reversion" from coverage and threatened injury to homeless group did not outweigh injury to the city. Stewart B. McKinney Homeless Assistance Act, Section 501, 42 U.S.C.A. Section 11411; 24 C.F.R. Section 581.2(b)(9).

5. Federal Courts 776

Court of Appeals reviews de novo the granting of a motion to dismiss, accepting as true all well-pleaded assertions in light most favorable to plaintiff.

6. Social Security and Public Welfare
9.5

City did not fall under requirements of Stewart B. McKinney Homeless Assistance Act because it was not a federal agency. 24 C.F.R. Section 581.2(a).

7. Social Security and Public Welfare
9.5

Reversionary interest exception to Stewart B. McKinney Homeless Assistance Act only requires that property be subject to reversions; it does not require that the reversion have already taken place. 24 C.F.R. Section 581.2(b)(9).

8. Social Security and Public Welfare
9.5

Land which was the site of former Air Force base which, upon base's closing, reverted to city fell under reversionary interest exception of the Stewart B. McKinney Homeless Assistance Act; express trust entered into by city and Air Force asserted that title to land was to remain vested with

the city, all written agreements expressly reasserted city's reversionary interest in the land, and there was no express or implied waiver or other relinquishment of city's reversionary interest. 24 C.F.R. Section 581.2(b)(9).

9. Fixtures 1

Under Texas law, three factors are relevant in a determining whether personalty has become a fixture, that is, a permanent part of the realty to which it is affixed; mode and sufficiency of annexation, either real or constructive; adaptation of article tot he use or purpose of the realty; and intention of the party who annexed the chattel to realty.

10. Fixtures 7

Social Security and Public Welfare 9.5

Although Air Force continually asserted its interest in ownership of the improvements on Air Force base, buildings and other structures left on the land when Air Force

base closed and land reverted to city were permanently attached tot he realty and, therefore, were "fixtures" under Texas law to be carried with the land and because the improvements were "fixtures", they were also subject to reversion and fell within reversionary interest exception of the Stewart B. McKinney Homeless Assistance Act; status of improvements as permanent "fixtures" to land was not altered by Air Force's abandonment of those structures when base closed. 24 C.F.R. Section 581.2(b)(9).

See publication Words and Phrases for other judicial construction and definitions.

Appeals from the United States District Court from the Western District of Texas.

Before BENAVIDES, STEWART and DENNIS, Circuit Judge

BENAVIDES, Circuit Judge:

Plaintiffs-Appellants appeal the district court's order and partial judgment denying Plaintiff-Appellants' request for a temporary restraining order and preliminary

injunction and dismissing Plaintiff-Appellants' claims against Defendant-Appellee City of Austin, and the district court's order and final judgment dismissing Plaintiff-Appellants' claims against all remaining Defendant-Appellees. We affirm.

BACKGROUND

In 1942, the Air Force[1] and the City of Austin ("city") negotiated an agreement whereby the Air Force used $466,000 supplied by the City to purchase 2,892 acres for a military air base, which became Bergstrom Air Force Base ("Bergstrom"). The terms of the agreement, set forth in a "night letter," included the following:

"TITLE TO VEST IN THE UNITED STATES AND

---

1. The Air Force did not become a separate branch of the Armed Services until 1947; until that time it was part of the United States Army.

TO BE CONVEYED TO THE CITY OF AUSTIN
WHEN NO LONGER NEEDED BY GOVERNMENT
AFTER PRESENT WAR SUBJECT TO RIGHT OF
RECAPTURE OF USE IN ANY FURTHER FUTURE
EMERGENCY ANY STRUCTURE ERECTED BY
GOVERNMENT WILL REMAIN PROPERTY OF
UNITED STATES
RUNWAYS[,] ROADS[,]ETC WHICH ARE NOT
SALVAGEABLE WILL REMAIN IN PLACE
LANDS WILL BE TURNED OVER TO THE CITY IN
PRESENT CONDITION EXCEPT AS TO EXISTING
BUILDINGS WHICH ARE TO BE DEMOLISHED
GOVERNMENT TO HAVE OPTION OF LEAVING ON
LANDS PART OR ALL STRUCTURES TO BE
ERECTED IN LIEU OF RESTORATION PERIOD

Then on February 27, 1947, the Austin City Council passed a resolution declaring that the City wanted the Air Force to continue using Bergstrom as an air base, stating that "only upon abandonment of Bergstrom Field as a permanent Army [Air Force] Air Base should the City of Austin request or demand that full legal and

equitable title to said lands, together with all improvements... revert to and vest in the City of Austin."[2]

In April 1991, Bergstrom was recommended for closure on September 30, 1993. Prior to the closure, the Air Force submitted virtually all of the after acquired property, i.e. 324 acres of land that was purchased with federal funds after the 1942 land purchase and all improvements on the total land acreage, to the Department of Housing and Urban Development ("HUD") for evaluation under the McKinney Act. [3] HUD determined that this property was unsuitable for use by the

---

2. In 1954, the Army Corps of Engineers, on behalf of the Air Force, informed the City of the government's position that "whatever legal interest the City may have in Bergstrom AFB is limited to the land acquired with funds furnished for that purpose by the City." and not in improvements constructed on the land by the federal government.

homeless, publishing its findings. See 58 Fed. Reg. 9208, 9215 (1993); 58 Fed. Reg. 15158 (1993); 58 Fed. Reg. 45353 (1993).

Bergstrom was closed on September 30, 1993, whereupon the City immediately took physical possession and control of the land. The Air Force was unable to execute a quitclaim deed immediately, however, due to the environmental cleanup requirements under Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). Therefore, the Air Force entered into a lease with the City under which the Air Force reiterated its intent to execute a quitclaim deed upon completion of the CERCLA obligations, reversing its right to access the land in

---

3. Since that time, the Air Force has discovered that 3.5 acres were overlooked, and is now providing HUD with the information on this parcel for a suitability determination under the McKinney Act.

order to complete the environmental cleanup. Plaintiffs-Appellants approached both the Air Force and the City about its concern over the disposition of the land, the proposed City airport, and funding for a detoxification program for the homeless on the improved land. The Air Force informed Plaintiffs-Appellants that because it no longer owned the land, it could not interfere with the City's ownership and use. In January 1995, the City issued a Request for Proposal to use some of the improvements on the land as interim transitional housing for homeless individuals or families. [4] The City received only one response, which was deemed non-responsive. Although Plaintiffs-Appellants wrote to express their support in a proposal

---

4. The City's Task Force also considered relocating the improvements off the base. Plaintiffs-Appellants criticized the plan because no funding was available to move the housing.

submitted by another organization, they did not propose their own plan to use the land improvements.

On December 11, 1995, Plaintiffs-Appellants [5] filed suit under Title V of the Stewart B. McKinney Homeless Assistance Act ("McKinney Act"), 42 U.S.C. Section 11411, seeking injunctive relief to prevent the removal and/or destruction of housing stock on 2,892 acres of land, which was the former Bergstrom. [6]

Plaintiffs-Appellants originally filed suit against the United States Air Force and the

---

5. Plaintiffs-Appellants include a homeless advocacy organization, its president, and an individual homeless person.

6. Plaintiffs-Appellants sought to enjoin the City from destroying or disturbing in any other way the improvements on the land at Bergstrom and to force Federal Defendants to report all land and improvements at Bergstrom pursuant to section 11411(a) of Title 42.

Department of Defense ("Federal Defendants"),later joining the City as a party defendant.

An evidentiary hearing was held on Plaintiffs-Appellants Application for Temporary Restraining Order and Preliminary Injunction on December 19, 1995, after which the district court denied both. The Court concluded that Plaintiffs-Appellants had failed to show a likelihood of success on the merits of their claim, and that the harm that would befall the City if the preliminary injunction were granted would far outweigh any harm to Plaintiffs-Appellants in denying it. The court found that the City maintained an equitable reversionary interest in the land and its improvements, subject only to a limited lease with the Air Force required under CERCLA to remediate environmental hazards on the land, which the court found did not disrupt the City's reversionary interest. The court also noted that the City could face delay damages of

over $73,000,000 if a one-year injunctionwere granted.

[1] On January 9, 1996, the district court granted the City's motion to dismiss, holding that the McKinney Act did not apply to the City because it was not a federal agency, and that the McKinney act did not apply to the land because it was subject to reversion. See 24. C.F.R. Section 581.2(b)(9). Then on March 20, 1996, the court granted a motion to dismiss filed by the federal defendants, concluding that the land was not "unutilized" or "underutilized" prior to closure of the base, and again holding that the disputed land and improvements were exempted from the McKinney Act as property subject to a reversionary interest. Final judgment was entered the same day. Plaintiffs-Appellants filed an interlocutory appeal of the denial of injunctive relief and the City's dismissal, 96-50065, and later an amended appeal from final judgment, 96-50265. Both appeals have

been consolidated.[7]

---

7. In addition to Plaintiffs-Appellants' challenge to the merits, Federal Defendants argue for the first item on appeal that this case should be dismissed for lack of jurisdiction. They claim that because Plaintiffs-Appellants lack the necessary "injury-in-fact" to support Article III standing. Because such an allegation calls into question our jurisdiction under Article III, we would normally resolve it before reaching the merits. There is, however, a clear exception to this general rule.

When the merits of the case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching the jurisdictional contention. See Secretary of Navy v. Avrech,

THE PRELIMINARY INJUNCTION

[2,3] A preliminary injunction may be granted only if the movant can establish four requirements:

---

fn.7 (cont.) 418 U.S. 676, 677-78, 94 S. Ct. 3039-40,41 L. Ed. 2d 1033 (1974); Richland Park Homeowners Ass'n Inc. v. Pierce, 671 F. 2d 935, 941 n. 3 (5th Cir. 1982); Adams v. Vance, 570 F 2d 950,954 & n.7 (D. C. Cir. 1978); Chinese Am. Civic Council v. Attorney Gen. of United States, 566 F. 2d 321, 325 (D. C. Cir. 1977); see also Charles A. Wright, et al., Federal Practice & Procedure Section 3531.15, at 102-04 (1984) ("Cases have been dismissed... on the merits, without deciding standing. Despite the occasional grave pronouncements that standing goes to the jurisdiction of the court, this course is entirely appropriate. There is no reason to decide a difficult question of standing if... it is easier to reject the claim on the merits.")

> First, the movant must establish a substantial likelihood of success of the merits. Second, there must be a substantial threat of irreparable injury if the injunction is not granted. Third, the threatened injury to the plaintiff must outweigh the threatened injury to the defendant. Fourth, the granting of the preliminary injunction must not disserve the public interest.

Cherokee Pump & Equipment Inc. v. Aurora Pump, 38 F3d 246, 249 (5th Cir. 1994)

---

fn 7 (cont.) Because standing was not raised below, the record on this issue is undeveloped and inadequate. Rather than remand the cause to the district court to more fully develop the record, in the interest of judicial economy we invoke the exception to the general rule that calls for reaching the standing issue and proceed to the merits of this appeal.

(citations omitted). We have frequently cautioned that "[a] preliminary injunction is an extraordinary remedy," and "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule." Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F 2d 618, 621 (5th Cir. 1985). "The decision to grant or deny a preliminary injunction lies within the discretion of the district court and will be reversed on appeal only upon a showing of abuse of discretion." DSC Communications Corp. v. DGI Technologies, Inc. 81 F3d 597,600 (5th Cir.-1996) (citing Blue Bell Bio-Medical v. Cin-Bad, Inc., 864 F2d 1253,1256 (5th Cir. 1989).

[4] The district court found that Plaintiffs-Appellants failed to demonstrate a substantial likelihood that they would succeed on the merits, concluding that neither Federal Defendants nor the City were subject to the regulations of the McKinney Act, which specifically exempts "property

interest subject to reversion" from coverage. See 24 C.F.R. Section 581.2(b)(9). In addition, the court found that Plaintiffs-Appellants failed to show that the threatened injury outweighs the damage that an injunction would cause the City, noting that a delay in the city's construction of the airport would produce damages in excess of $73,000,000. We agree with the district court's conclusions. Plaintiffs-Appellants have not presented any evidence of their ability to propose, implement, or finance a homeless program on any part of the land and/or its improvements. On the other hand, Defendants-Appellants have clearly shown that the City and its taxpayers would incur sever damages if a preliminary injunction were granted. Because the threatened injury to Plaintiffs-Appellants does not outweigh the threatened injury to the City, we find that the district court did not abuse its discretion in denying Plaintiffs-Appellants'

motion for a preliminary injunction.[8]

THE DISMISSALS

Plaintiffs- Appellants contend that the City failed to claim the property at Bergstrom in accordance with the 1942 express trust after World War II and therefore waived all right to do so at a later date. In addition, they argue that the City does not have any interest in the land acquired by Federal Defendants after 1942 with federal funds, nor does it maintain an interest in any improvements on all the property because federal Defendants expressly reserved their right to the improvements. As an alternative

---

8. Plaintiffs-Appellants also appeal the district court's denial of their motion for a temporary restraining order. We decline to address this issue in this appeal. "This court has long held that the denial of an application for a temporary restraining order in not appealable. Matter of Lieb, 915 F. 2d 180, 183 (5th Cir. 1990) (citations omitted).

argument, Plaintiffs-Appellants contend that even if the City does possess a reversionary interest in the land purchased in accordance with the 1942 agreement, its right to enjoyment cannot be granted until Federal Defendants have complied with CERCLA. They argue that the thirty year lease entered into between the City and the Air Force affirms title with the Air Force, only allowing the City access to the land by virtue of the lease agreement. Thus, Plaintiffs-Appellants assert, even if the City prevails regarding the reversionary interest, the land will not revert until the CERCLA lease is terminated, thereby making available all or part of the unused, excess property to the homeless for short-term leases.

[5] The district court granted the Defendants-Appellees; motions to dismiss finding 1) that the City is not a federal agency and is therefore not subject to the provisions of the McKinney Act and 2) that Federal Defendants do not possess or own for

purposes of the McKinney Act, the land and/orimprovements at Bergstrom at issue in this case because they are subject to the City's reversionary interest. " We review de novo the granting of a motion to dismiss, accepting as true all well pleaded assertions in the light most favorable to the plaintiff." Westfall v. Miller, 77 F3 868, 870 (5th Cir. 1996) (citing American Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F. 2d 1384, 1386 (5th Cir. 1991).

[6] Plaintiffs-Appellants claims against all Defendants-Appellees are asserted under the McKinney Act. The city does not fall under the requirements of the McKinney Act because it is not a federal agency. See 24 C.F.R. Section 581.2(a).[9]

---

9. Section 581.2(a) states in pertinent part:

This part applies to Federal real property which has been designated by Federal landholding agencies as unutilized,

[7,8] With regard to Federal Defendants' motion to dismiss, we find that the land and the improvements atBergstrom fall under an exception of the McKinney Act as "[p]roperty interest subject to reversion" and are therefore, not subject to the provisions of the McKinney Act.[10] 24 C.F.R. Section 581.2(b)(9). The reversionary interest exception to the McKinney Act only requires that the property be "subject to reversion"; it does not require that the reversion have already taken place. The express trust entered into in 1942

---

fn 9 (cont.) underutilized, excess or surplus and is therefore subject to the provisions of title V of the McKinney act (42 U.S.C. 11411)(emphasis added).

10. All after-acquired property purchased with federal funds have now been reported to HUD in compliance with the requirements of the McKinney Act and will therefore not be addressed further in this decision.

clearly asserted that title to the land was to remain vested with the City. All written agreements since 1942 have expressly reasserted the City's reversionary interest int he land. Our review of the record, including all written agreements created subsequent to the 1942 express trust agreement, reveals no express or implied waiver or other relinquishment of the City's reversionary interest. Even the CERCLA lease expressly reserves the City's right to the land. Therefore we find that, pursuant to the language of the McKinney Act, the land at Bergstrom is not subject to the provisions of the Act because it is "subject to reversion" to the City.

[9,10] Additionally, we find that the improvements made on the land at Bergstrom are also subject to reversion to the City. Although the Air Force continually asserted its interest in ownership of the improvements, we find that the buildings and other structures left on the land when

Bergstrom closed in 1993 were permanently attached to the realty and therefore fixtures under Texas law to be carried with the land.

Three factors are relevant in determining whether personality has become a fixture, that is, a permanent part of the realty to which it is affixed: (1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty. Logan v. Mullis, 686 S. W. 2d 605,607 (Tex. 1985) (citations omitted). The status of the improvements as permanent fixtures tot he land is not altered by Federal Defendants' abandonment of those structures when Bergstrom closed. Once the improvements, which include large buildings, runways, and other similar structures, were affixed in the manner that they were, they became part of the land. Id at 608. Therefore, because the improvements are fixtures on the land, they

are also subject to reversion under the Act. Accordingly, we find that the district court did not err in granting Federal Defendants' motion to dismiss.

CONCLUSION

For the reasons articulated above, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, et al.,	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	
	)	No.88-2M03-OG
UNITED STATES VETERAN'S ADMINISTRATION, et al.,	)	
Defendants,	)	

Counsel: Phyllis Thompson and Jonathan T. Feet, Covington & Burling, Washington, D.C., and Maria Foscarinis, National Law Center on Homelessness and Poverty, Washington, D. C., for plaintiffs

Stuart M. Gerson, Assistant Attorney General, Felix V. Baxter and Carlotta P. Wells, Department of Justice, Washington, D. C. for defendants

ORDER

Upon consideration of plaintiffs' motion to modify and further enforce the permanent injunction, defendants' response thereto, and for the reasons set forth in the accompanying Memorandum, it by the Court this 21st day of April, 1993.

ORDERED that the Court's Orders filed on December 13, 1988, May 22, 1989, February 13, 1991, and May 2, 1992, be, and they hereby are, modified and consolidated as set forth below:

1. Canvassing and Reporting Procedures

1) Land-holding agencies shall review their property holdings at least annually pursuant to 40 U.S.C. Section 483(b) and 41 C.F.R. Section 101-47.802(a).

2) HUD shall canvass all land-holding agencies quarterly to collect information about unused or underused federal property. HUD's canvass shall include, but not be limited to, collection of information regarding all property declared excess or surplus and all properties declared unutilized or underutilized in surveys made pursuant to 40 U.S.C. Section 483(b) and 41 C.F.R. Section 101-47.802(a) or Executive Order 12512 and 41 C.F.R. Section 101-47.802(b). The first and third such quarterly canvasses of each calendar year

shall be comprehensive; the second and fourth quarterly canvasses of the same calendar year may be supplemental quarterly canvasses to determine whether land-holding agencies have property that is unutilized, underutilized, excess or surplus, but was not identified in the prior quarter's comprehensive canvass, or was included in the prior quarter's comprehensive canvass, but has had a change in status.

3) HUD'S canvassing letters must indicate that HUD, and not the land-holding agency, is to make all suitability determinations.

4) Land-holding agencies shall report to HUD, no more than 25 days after receiving HUD'S request for information, any and all excess, surplus, unutilized or underutilized properties owned or controlled by the agencies.

5) HUD shall make suitability determinations of properties identified as surplus, excess, unutilized or underutilized

within 30 days after receiving the land-holding agency's canvass response.

6) HUD shall publish a list of suitable and available properties in the Federal Register and shall provide a copy of the list to plaintiffs' counsel. HUD must publish this list, at a minimum, once per month. HUD may, however, continue its current practice of weekly publication in the Federal Register if it is practicable. In the event HUD decides to change over to monthly publication, it must give plaintiffs 90 days notice prior to the effective date of the change and must also publish notice of the change in the Federal Register.

II. Application Process

7) Properties identified in the Federal Register as suitable and available shall not be available for any other purpose for at least 60 days from the date of publication. If a written notice of intent to apply for such property is received by the Secretary of Health and Human Services within 60 days of

publication, such property may not be made available for any other purpose until HHS has completed action on an application for property. Applications shall be submitted within 90 days of the written notice of intent to apply; HHS shall, with the concurrence of the appropriate land-holding agency, extend this period upon reasonable request by the applicant.

8) HHS shall accept and process all applications for property deemed suitable and available by HUD pursuant to the McKinney Act.

9) HHS shall complete its action on the application within 25 days of receipt of a completed application. This period may be extended by agreement of HHS and the applicant. HHS shall make and maintain a written record of all actions taken in response to an application.

10) HHS must provide with each application packet sent to interested persons a notice identifying the plaintiff National

Law Center on Homelessness and Poverty, giving the National Law Center's telephone number and stating its availability to assist homeless providers in resolving any problems that may arise in the application and leasing processes. HHS must also include notice in the application material that HHS staff persons are available to assist in the application process, and the telephone number that the applicant may call to obtain that assistance. In addition, HHS must include notice that the Interagency Council on Homelessness may be able to help identify possible sources of funding, including the telephone number of the council. HHS must indicate that the Federal Programs to Help Homeless People publication is available from the Interagency Council.

11) HHS must provide with the environmental questionnaire the identity of a direct reference person who can provide the homeless provider with assistance on how to complete the questionnaire.

12) HHS must provide with the environmental questionnaire information on how applicants can obtain environmental information that is within defendants' possession.

13) HHS must, if necessary, provide assistance to applicants in obtaining environmental information that is within the defendants' possession.

14) HHS must allow an intent to apply for Title IV funds to be sufficient to satisfy the homeless provider's financial showing requirement.

III. Outreach

15) Defendants must initiate an outreach program that provides direct information to homeless providers on the properties that are available in their localities. As part of this program, defendants shall sponsor, in each community where there is a military base closure scheduled, a workshop or seminar to educate potential applicants about the McKinney Act program and how to apply for

property. Defendants shall advertise and promote the holding of such workshop or seminar to reasonably inform those persons and groups who might be interested in the workshop or seminar. Such workshop or seminar shall be held reasonably prior to the availability of the base closure property under the McKinney Act to permit timely application.

16) GSA, HUD, and HHS shall submit to plaintiffs' counsel a monthly report identifying for each month: a) those properties made available to assist the homeless, including the status of all applications submitted and pending, even if the property is made available by an agency other than GSA, HUD, and HHS; b) those properties sold, transferred or otherwise disposed of; and c) all persons and organizations that have contacted defendants to inquire about applying for any property under the McKinney Act program, the date of the contact and the property which was the

subject of their inquiry. GSA, HUD, and HHS shall also file with the Court, each month, a certificate that the monthly report has been prepared and delivered to plaintiffs' counsel.

17) Jurisdiction is retained for the purposes of enabling any of the parties to seek such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Decree, for the modification of any of the provisions thereof, for the enforcement of compliance and punishment of violations thereof, and to determine the costs and attorneys' fees that may be recovered by plaintiffs.

_____
Judge

April 21, 1993

APPENDIX C

SUBCHAPTER V - IDENTIFICATION AND USE OF SURPLUS FEDERAL PROPERTY

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 11408 of this title.

11411. Use of unutilized and underutilized public buildings and real property to assist the homeless.

(a) Identification of suitable property

The Secretary of Housing and Urban Development shall, on a quarterly basis, request information from each landholding agency regarding Federal public buildings and other Federal real properties (including fixtures) that are excess property or surplus property or that are describe as unutilized or underutilized in surveys by the heads of landholding agencies under section 483(b)(2) of title 40. No later than 25 days after receiving a request from the Secretary, the head of each landholding agency shall transmit such information to the Secretary. No later than 30 days after receiving such

information, the Secretary shall identify which of those buildings and other properties are suitable for use to assist the homeless.

(b) Availability of property

(1) The Secretary shall promptly notify each Federal agency with respect to any property of that agency that the Secretary has identified under subsection (a) of this section. No later than 45 days after receipt of such a notice, the head of the appropriate landholding agency shall transmit to the Secretary the agency's response to property identifications contained in such notification, which shall include

(A) in the case of unutilized or underutilized property -

(i) a statement of intention to determine the property excess to the agency's needs;

(ii) a statement of intention to make the property available for use to assist the homeless; or

(iii) a statement of the reasons

(including a full explanation of the need) the property cannot be determined excess to the agency's needs or made available for use to assist the homeless; and

(B) in the case of excess property -

(i) a statement that there is no other compelling Federal need for the property and, therefore, the property will be determined surplus; or

(ii) a statement that there is further and compelling Federal need for the property (including a full explanation of such need) and that, therefore, the property is not presently available for use to assist the homeless.

(2)(A) All properties identified by the Secretary under subsection (a) of this section shall be available for application --

(i) in the case of property other than surplus property, for use to assist the homeless in accordance with the provisions of this section; and

(ii) in the case of surplus

property, for use to assist the homeless either in accordance with this section or as a public health use in accordance with paragraphs (1) and (4) of section 484(k) of Title 40.

(3) The Secretary shall maintain a written public record of -

(A) the identification of buildings and other properties by the Secretary under this subsection and the reasons for such identifications; and

(B) the responses of the landholding agencies to such identification

(c) Publication of properties

(1)(A) No later than 15 days after the last day of the 45-day period provided for under subsection (b)(1) of this section, the Secretary shall publish in the Federal Register -

(i) a list of all properties reviewed by the Secretary under subsection (a) of this section; and

(ii) a list of all properties that

are available under subsection (b)(2) of this section for application for use to assist the homeless.

(B) Each publication of properties shall include a description and the location of each property (including the address and zip code) and the current classification of each property as unutilized, underutilized excess property, or surplus property.

(C) The Secretary shall make available to the public upon request all information in the possession of the Department of Housing and Urban Development (other than valuation information), regardless of format, about all properties reviewed and not identified as being suitable for use to assist the homeless, including the reasons such properties were not so identified.

(D) The Secretary shall publish separately, on an annual basis, all properties identified as being suitable for se to assist the homeless, but reported to be unavailable, and the reasons such properties

were unavailable.

(2)(A) No later than 15 days after the last day of the 45-day period provided for under subsection (b)(1) of this section, the Secretary shall transmit a copy of the list of available properties published under paragraph (1)(A)(ii) to the Interagency Council on the Homeless. The Council shall immediately distribute to all State and regional homeless coordinators are-relevant portions of the list.

(B) The Secretary, the Administrator, and the Secretary of Health and Human Services shall make such efforts as are necessary to ensure the widest possible dissemination of the information on such list.

(C) The Secretary shall establish a toll-free number to provide the public with specific information about properties on such list.

(3) The Secretary shall make available to the public upon request all information

(other than valuation information) regardless of format in the possession of the Department of Housing and Urban Development about the properties published under paragraph (1)(A) including environmental assessment data. The Secretary shall maintain a current list of agency contacts for making referrals of inquiries for information about specific properties.

(4)(A) n December 31 of each year, the head of each landholding agency shall report to the Secretary the current availability status and the current classification of each property controlled by the agency, that -

(i) was included in a list published in that year by the Secretary under paragraph (1)(A)(ii); and

(ii) remains available for application for use to assist the homeless or has become available for application during that year.

(B) No later than February 15 each year, the Secretary shall publish in the Federal

Register a list of all properties reported under subparagraph (A) for the preceding year and the current classification of the properties.

(C) For purposes of subparagraph (A), property shall not be considered to remain available for application for use to assist the homeless after the 60-day holding period provided under subsection (d) of this section if-

(i) an application for or written expression of interest in the property is made under any law for use of the property for any purpose; or

(ii) the Administrator receives a bona fide offer to purchase the property or advertises for the sale of the property by public auction.

(d) Holding period

(1) Properties published under subsection (c)(1)(A)(ii) of this section as available for application for use to assist the homeless shall not be available for any

other purpose for a period of 60 days beginning on the date of such publication.

(2) If written notice of intent to apply for such a property for use to assist the homeless is received by the Secretary of Health and Human Services within the 60-day period described under paragraph (1), such property may not be made available for any other purpose until the date the Secretary of Health and Human Services or other appropriate landholding agency has completed action on the application submitted under subsection (e) of this section with respect to that written notice of intent.

(3) Property that is reviewed by the Secretary under subsection (a) of this section and that is not identified by the Secretary as being suitable for use to assist the homeless may not be made available for any other purpose for 20 days after the determination of unsuitability to allow for review of the determination at the request of the representative of the homeless. The

Secretary shall disseminate immediately this information to the regional offices of the Department of Housing and Urban Development and to the Interagency Council on the Homeless.

(4)(A) Written notice of intent to apply for a property published under subsection (c)(1(A)(ii) of this section may be filed at any time after the 60-day period described in paragraph (1) has expired. In such case, an application submitted pursuant to the notice may be approved for disposal for use to assist the homeless only if the property remains available for application for use to assist the homeless. If the property remains available, the use to assist the homeless shall be given priority of consideration over other competing disposal opportunities under section 484 of Title 40, except as provided in subsection (f)(3)(A) of this section.

(B) Surplus property for which an application has been approved shall be assigned promptly to the Secretary of Health

and Human Services for disposition in accordance with and subject to subsection (f) of this section.

(e) Application for property

(1) A representative of the homeless may submit an application to the Secretary of Health and Human Services for any property that is published under subsection (c)(1)(A)(ii) of this section as available for application for use to assist the homeless.

(2) No later than 90 days after the submission of written notice of intent to apply for a property, an applicant shall submit a complete application of the Secretary of Health and Human Services. The Secretary of Health and Human Services shall, with the concurrence of the appropriate landholding agency, grant reasonable extensions.

(3) No later than 25 days after receipt of a completed application, the Secretary of Health and Human Services shall review, make

all determinations, and complete all actions on the application. The Secretary of Health and Human Services shall maintain a written public record of all actions taken in response to an application.

(f) Making property available to representatives of homeless

(1) Subject to the provisions of this subsection, property for which the Secretary of Health and Human Services has approved an application under subsection (e) of this section shall be made promptly available by permit or lease, or by deed as a public health use under paragraphs (1) and (4) of section 484(k) of Title 40, to the representative of the homeless that submitted the application.

(2) Unutilized or underutilized property that is the subject of an agency's statement of intention under subsection (b)(1)(A)(ii) of this section shall be made promptly available by the appropriate landholding agency to the approved applicant by lease or

permit for a term of not less than 1 year, unless the applicant requests a shorter term.

(3)(A) In disposing of surplus property by deed or lease under section 484 of Title 40, the Administrator and the Secretary of Health and Human Services shall give priority of consideration to uses to assist the homeless, unless the Administrator or the Secretary of Health and Human Services determines that a competing request for the property under section 484(k) of Title 40 is so meritorious and compelling as to outweigh the needs of the homeless.

(B) Whenever the Administrator or the Secretary of Health and Human Services makes a determination under subparagraph (A), the Administrator or the Secretary of Health and Human Services shall transmit to the appropriate committees of the Congress an explanatory statement detailing the need satisfied by conveyance of the surplus property and the reasons for determining that such need was so meritorious and compelling

as to outweigh the needs of the homeless.

(4) For any property made available by lease to a representative of the homeless before November 29, 1990, the Secretary of Health and Human Services may, upon written request by the representative, convey such property by deed to the representative in accordance with, and subject to the requirements of section 484(k) of Title 40. The lease term shall not be affected if a deed is not granted.

(g) Records

The Secretary shall maintain a written public record of -

(1) the reasons for determinations of he Secretary under this section that property is suitable or unsuitable for use to assist the homeless; and

(2) the responses of landholding agencies under subsection (b)(1) of this section.

(h) Applicability to property under base closure process

(1) The provisions of this section shall not apply to buildings and property at military installations that are approved for closure under the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note) after October 25, 1994.

(2) For provisions relating to the use to assist the homeless of buildings and property located at certain military installations approved for closure under such Act, or under title II of the Defense Authorization Amendments and Base Closure and Realignment Act
(Public Law 100-526; 10 U.S.C. 2687 note), before such date, see section 2(e) of Base Closure Community Redevelopment and Homeless Assistance Act of 1994.

(i) Definitions

For purposes of this section -

(1) the term "Administrator" means the Administrator of General Services;

(2) each of the terms "excess property"